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R. Martin
Proc. II

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-190150

DATE: February 9, 1978

MATTER OF:

California Meat Company

DIGEST:

Recommendation by head of contracting agency for Comptroller General's concurrence in partial equitable remission of liquidated damages assessed for delivery delinquency is rejected because basis for recommendation is that assessment is legally doubtful rather than inequitable and record does not support agency's doubt as to legal sufficiency of assessment.

The Secretary of Agriculture has requested the Comptroller General to remit a portion of the liquidated damages assessed against the California Meat Company (California) under contract No. 12-25-6-3311 for delivery of frozen ground beef.

This matter has been submitted here pursuant to 41 U.S.C. 256a (1970), which authorizes the Comptroller General, upon the recommendation of the head of any Federal Agency to remit the whole or any part of liquidated damages assessed for delay as in his discretion may be just and equitable.

The subject contract provided for liquidated damages to be assessed at a daily rate if performance was not made by the contract's final shipment date "until such time as [the] Agency obtains or could have obtained shipment of a similar commodity elsewhere." However, in no event were liquidated damages to be imposed for more than 45 days of delay.

The subject contract was awarded to California on January 14, 1976, requiring delivery for the week of February 22, 1976. The contract was terminated by telegram dated February 11, 1976, because of the Government's summary withdrawal from California of Federal meat grading and acceptance services (based on the

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firm's alleged violations of applicable regulations), and because of the firm's advice to the contracting officer of its inability to meet the delivery date. On the following day the contracting officer placed an order for its terminated requirements with Salem Packing Co., requesting shipment for the week of March 21, 1976. The reprocurd items were not delivered by Salem until some time after March 21, 1976, and more than 45 days after the original delivery date.

Liquidated damages were assessed against California for 45 days delay because the Government did not obtain the commodity from Salem before the expiration of 45 days after the original delivery date. California has appealed this assessment to the Board of Contract Appeals claiming its inability to perform was excusable under the contract. The Government contests California's appeal on the basis that its inability to perform was not an excusable delay because the withdrawal of Federal meat grading and acceptance services arose out of the conduct of California's employees.

California now proposes to settle its appeal if the Government will relinquish its claim for 15 days of liquidated damages, representing the time between March 21, 1976 (the date delivery initially was requested from Salem) and the end of the 45 day maximum period for assessing liquidated damages under California's contract.

Agriculture recommends partial remission of liquidated damages in the amount of \$5,197.50 because there is "some question as to the liability of California *** for this 15 days," that is, the claim may be legally doubtful. However, the function of this Office under 41 U.S.C. 256a is to determine the equities of the assessment. We find no equitable basis for approving remission in this case. Moreover, we believe the matter should be resolved by the Board of Contract Appeals because we are not in a position to conclude that the Government does not have a valid legal basis for assessing liquidated damages for a period of 45 days. Although the agency's report concludes that Salem was required to make deliveries by the week of

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March 21, 1976, the record before us merely shows that on February 12, 1976 the contracting officer unilaterally issued a purchase order to Salem and is devoid of evidence to show how a valid contract with Salem for delivery of the items by a date certain arose from this action.

Accordingly, the request is denied.


Deputy Comptroller General
of the United States